LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
AUG 20 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 73-290

LORENZO DOUGLAS,

Petitioner,

-vs-

STATE OF ARIZONA and
GARY K. NELSON, as
Attorney General of
the State of Arizona,

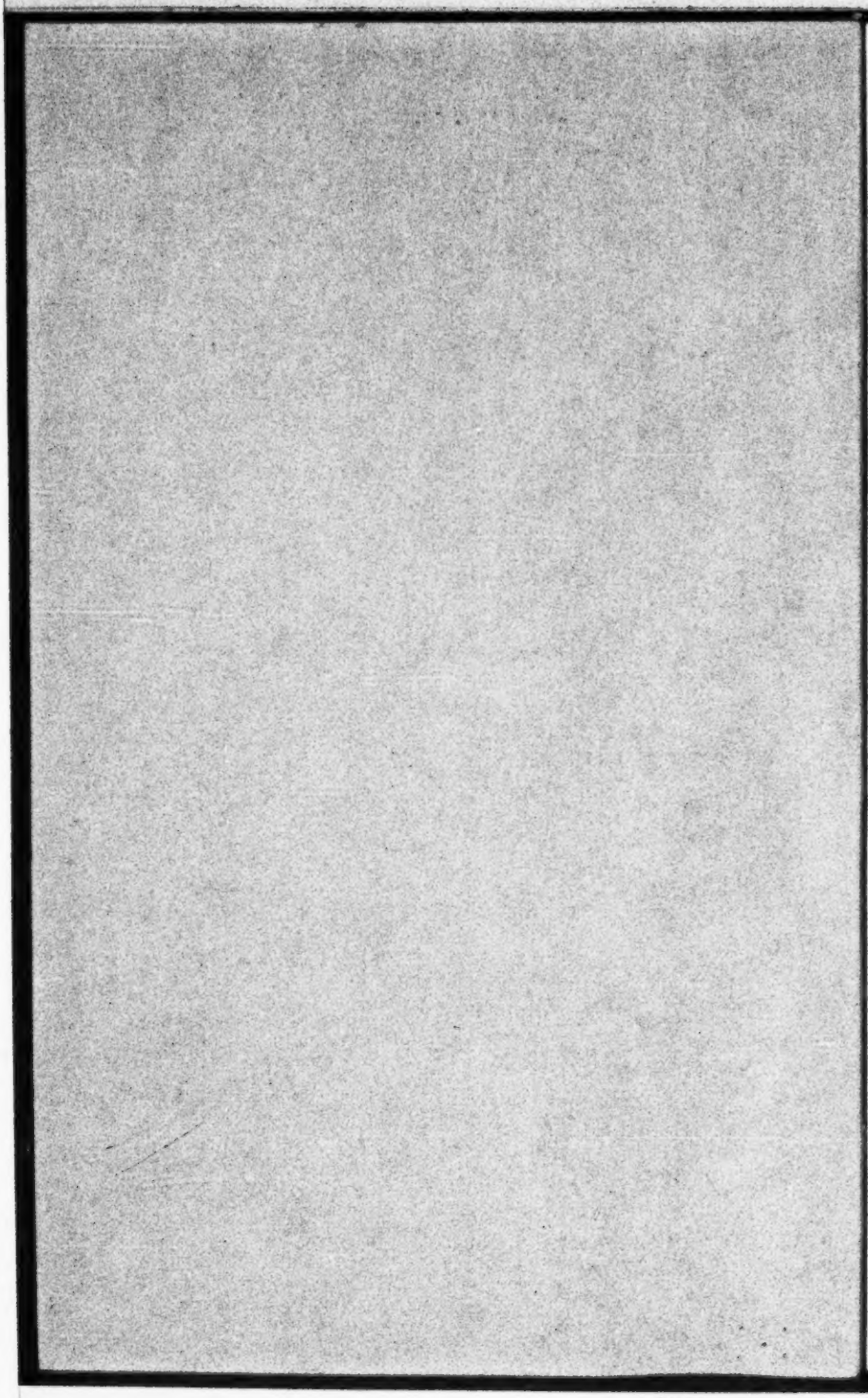
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

GARY K. NELSON
The Attorney General
of the State of Arizona

JOHN S. O'DOWD
Assistant Attorney General
415 West Congress
Tucson, Arizona

Attorneys for Respondent



IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

No.

LORENZO DOUGLAS,

Petitioner,

v.

STATE OF ARIZONA and
GARY K. NELSON, as
Attorney General of
the State of Arizona,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

GARY K. NELSON
The Attorney General
of Arizona

JOHN S. O'DOWD
Assistant Attorney General
415 W. Congress
Tucson, Arizona
Attorneys for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

No.

LORENZO DOUGLAS,

Petitioner,

v.

STATE OF ARIZONA and
GARY K. NELSON, as
Attorney General of
the State of Arizona,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT OF
THE STATE OF ARIZONA

GARY K. NELSON
The Attorney General
of Arizona

JOHN S. O'DOWD
Assistant Attorney General
415 W. Congress
Tucson, Arizona
Attorneys for Respondent

INDEX

	Page
REASONS FOR DENYING THE WRIT	1
CONCLUSION	7

INDEX

	Page
REASONS FOR DENYING THE WRIT	1
CONCLUSION	7

TABLE OF CASES

	Page
Edgar v. U.S. 377 U.S. 970 84 S.Ct. 1651 12 L.Ed.2d 739 (1964)	2
Harris v. U.S. 390 U.S. 234 88 S.Ct. 992	1
Terry v. Ohio 392 U.S. 1 88 S.Ct. 1868 20 L.Ed.2d 889 (1968)	4
U.S. v. Grogan 293 F.Supp. 45 (N.D. Ala.,1968)	2
U.S. v. Horton 328 F.2d 132 (3rd Cir., 1964) cert.den. sub nomen	2
U.S. v.McDaniel 154 F.Supp. 1 (D.D.C.,1957)	2
U.S. v. Thoreson 281 F.Supp. 598 (N.D. Calif.,1967)	2

TABLE OF CASES

Page

Edgar v. U.S.
377 U.S. 970
84 S.Ct. 1651
12 L.Ed.2d 719 (1964) 2

Harris v. U.S.
390 U.S. 234
88 S.Ct. 992 1

Terry v. Ohio
392 U.S. 1
88 S.Ct. 1868
20 L.Ed.2d 889 (1968) 4

U.S. v. Grogan
750 F.Supp. 45 (N.D. Ala.,1968) 2

U.S. v. Morton
329 F.2d 132 (3rd Cir., 1964)
cert.den. sub nomen 2

U.S. v.McDaniel
154 F.Supp. 1 (D.D.C.,1957) 2

U.S. v. Thorpson
201 F.Supp. 598 (N.D. Calif.,1967) 2

REASONS FOR DENYING THE WRIT

I. No violation of the Fourth Amendment occurred.

It is undisputed that Petitioner's roommate consented to the entry of the police officer into the apartment where the officer observed the pistol. Therefore, the officer had a right to be in the position where he would have a view of the pistol. In Harris v. U.S., 390 U.S. 234, 88 S.Ct. 992, the rule was succinctly stated that:

> It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. 390 U.S. at 236, 88 S.Ct. at 993.

The observation of the pistol on the countertop by the police officer did not

REASONS FOR DENYING THE WRIT

1. No violation of the Fourth Amendment occurred.

It is undisputed that Petitioner's roommate consented to the entry of the police officer into the apartment where the officer observed the pistol. Therefore, the officer had a right to be in the position where he would have a view of the pistol. In Harris v. U.S., 390 U.S. 234, 88 S.Ct. 992, the rule was succinctly stated thus:

> It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. 390 U.S. at 236, 88 S.Ct. at 993.

The observation of the pistol on the countertop by the police officer did not

constitute a search. U.S. v. Grogan, 293 F.Supp. 45 (N.D. Ala., 1968) It is not a search to see what is patent. U.S. v. McDaniel, 154 F.Supp. 1 (D.D.C., 1957) If the presence of the police officer inside the apartment premises was lawful, his observation of what was apparent was not a wrong. U.S. v. Horton, 328 F.2d 132 (3rd Cir., 1964), cert.den. sub nomen; Edgar v. U.S., 377 U.S. 970, 84 S.Ct. 1651, 12 L.Ed.2d 739 (1964) The police officer was not required to blind his eyes to the pistol which was in plain sight. U.S. v. Thoreson, 281 F.Supp. 598 (N.D. Calif., 1967)

In this case, the police officer had a further reason to inspect the pistol other than mere idle curiosity. His reason was to protect himself. As shown in the trans-

constitute a search. U.S. v. Groban, 293 F.Supp. 45 (M.D. Ala., 1968) It is not a search to see what is patent. U.S. v. McDaniel, 154 F.Supp. 1 (D.D.C., 1957) If the presence of the police officer inside the apartment premises was lawful, his observation of what was apparent was not a wrong. U.S. v. Horton, 332 F.2d 132 (3rd Cir., 1964), cert.den. sub nomen: Rowan v. U.S., 377 U.S. 970, 84 S.Ct. 1631, 12 L.Ed.2d 739 (1964) The police officer was not required to blind his eyes to the pistol which was in plain sight. U.S. v. Thorgeson, 281 F.Supp. 598 (N.D. Calif., 1967)

In this case, the police officer had further reason to inspect the pistol other than mere idle curiosity. His reason was to protect himself. As shown in the trans-

cript of evidence, Motion to Suppress, the officer testified:

> Q. And you were about twenty feet from the gun, from the gun that was on the counter top?
>
> A. I would say based on the size of the room I would say my footage from the gun was approximately anywhere from twelve to thirteen feet.
>
> . . .
>
> Q. And so then upon observing the gun what did you do?
>
> A. I immediately walked over to the weapon that was sitting on the counter top and I picked it up.
>
> Q. Why did you do that?
>
> A. For my own protection. I went to see if the weapon was loaded or not. (R.T. p. 8) (emphasis added)

As was noted by this court in the land-

strike of evidence, Motion to Suppress, the officer testified:

Q. And you were about twenty feet from the gun, from the gun that was on the counter top?

A. I would say based on the size of the room I would say my footage from the gun was approximately anywhere from twelve to thirteen feet.

. . .

Q. And so then upon observing the gun what did you do?

A. I immediately walked over to the weapon that was sitting on the counter top and I picked it up.

Q. Why did you do that?

A. For my own protection. I want to see if the weapon was loaded or not. (R.T. p. 8) (emphasis added)

As was noted by this court in the land-

mark case of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968):

> . . .Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.
>
> In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest . . . (emphasis added) 392 U.S. at 23,24

The danger from the pistol in this case was obvious to the officer and there was no frisk of the person of Juarigue to

mark case of Terry v. Ohio, 392 U.S. 1,
88 S.Ct. 1868, 20 L.Ed.2d 889 (1968):

> . . . Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American citizens have a joint tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.
>
> In view of these facts, we cannot bind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. . . . (emphasis added)
> 392 U.S. at 23,24

The danger from the pistol in this case was obvious to the officer and there was no [illegible] of the person of Jaeglye to

determine the presence of the weapon. Since the object was not removed from the person of Juarigue, the principles governing frisk do not apply. However, the police officer undoubtedly had a right to protect himself by examining the pistol which was in plain view. During the examination of the pistol, the serial number was mentally noted by the officer and that number was open to view. It was not unreasonable for him to make a mental note of the serial number which was readily ascertainable to him upon close examination of the pistol. There is, therefore, no basis for Petitioner's claim in this case that the police engaged in a fishing expedition or general exploratory search

determine the presence of the weapon. Since the object was not removed from the person of Jauregui, the principles governing frisk do not apply. However, the police officer undoubtedly had a right to protect himself by examining the pistol which was in plain view. During the examination of the pistol, the serial number was mentally noted by the officer and that number was open to view. It was not unreasonable for him to make a mental note of the serial number which was readily ascertainable to him upon close examination of the pistol. There is, therefore, no basis for Petitioner's claim in this case that the police engaged in a fishing expedition or general exploratory search

in obtaining the pistol's serial number. The pistol and its serial number were in plain view and both were examined by the officer from his position in the apartment after he had been allowed to enter with the consent of the occupant. The officer's invitation to enter the apartment justified his examination of objects lying open in his plain view once he entered the apartment, and no search was made to discern the evidence leading to Petitioner's arrest in this case.

in obtaining the pistol's serial number.
The pistol and its serial number were in
plain view and both were examined by the
officer from his position in the apart-
ment after he had been allowed to enter
with the consent of the occupant. The
officer's invitation to enter the apart-
ment justified his examination of objects
lying open in his plain view once he
entered the apartment, and no search was
made to discern the evidence leading to
petitioner's arrest in this case.

CONCLUSION

Respondent respectfully submits that Douglas' Petition for Writ of Certiorari be denied.

Respectfully submitted,

GARY K. NELSON
The Attorney General

John S. O'Dowd

JOHN S. O'DOWD
Assistant Attorney General

Attorneys for Respondent

CONCLUSION

Respondent respectfully submits that Dunglas' Petition for Writ of Certiorari be Denied.

Respectfully submitted,

GARY K. NELSON
The Attorney General

JOHN S. O'DOWD
Assistant Attorney General

Attorneys for Respondent

AFFIDAVIT

STATE OF ARIZONA)
)ss.
County of Pima)

PATRICIA C. SQUIRE, being first duly sworn upon oath deposes and says:

That she is employed by the Attorney General of Arizona as secretary to John S. O'Dowd, member of the bar of the Supreme Court of the United States; that she served the petitioner in the foregoing cause by forwarding two (2) exact copies of Respondent's Response to Petition for Writ of Certiorari in a sealed envelope, first class postage prepaid, and deposited same in the United States mail addressed to:

Larry S. Rosenthal, Esq.
940 S. Craycroft
Tucson, Arizona 85711

AFFIDAVIT

STATE OF ARIZONA)
)ss.
County of Pima)

PATRICIA C. SQUIRE, being first duly sworn upon oath deposes and says:

That she is employed by the Attorney General of Arizona as secretary to John S. O'Dowd, member of the bar of the Supreme Court of the United States; that she served the petitioner in the foregoing cause by forwarding two (2) exact copies of Respondent's Response to Petition for Writ of Certiorari in a sealed envelope, first class postage prepaid, and deposited same in the United States mail addressed to:

Barry S. Rosenthal, Esq.
940 S. Craycroft
Tucson, Arizona 85711

this 17th day of August, 1973.

Patricia C. Squire

SUBSCRIBED AND SWORN to before me

this 17th day of August, 1973.

Sarah E. Mallett

Notary Public

My Commission Expires:

12-9-76